

ARIZONA PROSECUTING ATTORNEYS ADVISORY COUNCIL

REPORT ON PROSECUTORIAL RESPONSE TO COVID-19

January 1 thru April 15, 2020

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Through March of 2020, the Arizona state economy was robust. State general fund revenues were 8.1% higher than the prior year.² The January 2020 economic forecast for Arizona assumed state revenues would increase by 3.6% and remain on a similar 3-4% growth trajectory through 2022.³ The growth in revenue is attributable to growth generally in the Arizona economy, which is characteristically cyclical but in a then-strong phase. The two-year population trend line of inmates in the Arizona Department of Corrections at the close of December 2019 had flattened.⁴ National and international business and tourism with Arizona remained strong following seven years of increase to GDP.⁵ At the close of 2019, no one of ordinary intelligence knew that the SARS-CoV-2 virus even existed. The State's Universities commenced their Spring semesters, locally-based athletes prepared for the Summer Games in Tokyo, Japan, Pearl Jam planned an April 11th concert tour stop in Glendale, baseball fans attended Spring Training, and Governor Doug Ducey gave a State of the State address with no hint of the kinds of decisions that leadership would require of the Executive just 60 days later. For all intents and purposes, Opening Day at the

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² JLBC Staff – April 2020 Revenue and Budget Update Report, April 9, 2020, at p. 2. [Arizona Joint Legislative Budget Committee].

³ Id., JLBC 4-Sector Forecast. The four sectors of state revenue tracked by JLBC are sales tax, individual income tax, corporate income tax, and insurance premium tax.

⁴ https://corrections.az.gov/sites/default/files/REPORTS/Stats/mar2020/internetmar20_2yrpop.pdf. The rolling monthly count hovered between 41-42,000.

⁵ Total direct travel spending in Arizona was \$24.4 billion in 2018. Non-transportation visitor spending increased by 7.1 percent, following a 6.3 percent increase from 2016 to 2017. Real travel spending increased by 5.3 percent in 2018. Visitor air travel on domestic flights to Arizona destinations increased by 4.4 percent in 2018, following a 5.8 percent increase the preceding year. Room demand increased by 4.1 percent for 2018, following a 2.8 percent increase the preceding year. Direct travel-generated employment was 192,300 in 2018. This represents an addition of 4,100 jobs, an increase of 2.3 percent. The re-spending of travel-related revenues by businesses and employees creates secondary impacts. In 2018, the secondary impacts were 165,300 jobs with \$7.8 billion in earnings. The Gross Domestic Product of the travel industry was \$10.5 billion in 2018. The travel industry and the microelectronics industry have been the top two export-oriented industries in the state in recent years. *Arizona Travel Impacts*, Dean Runyan Associates, June 2019, prepared for the Arizona Office of Tourism, Phoenix, Arizona.

Arizona Legislature was bright and cheerful. Optimism for Arizona's future was present in abundance.

SARS-CoV-2 quickly changed that perspective. We all now have a common, visceral experience of what happened next. And as prosecutors, we also know what the recent events of history have required of us. The purpose for this study is to collect and assess prosecutorial leadership in four key areas: (1) remote deployment; (2) executive interaction with judicial leadership to obtain modified administrative orders; (3) efforts to address jail and detention populations; and (4) conclusions and determinations regarding innovation and best practices derived from response to the pandemic of COVID-19.

EXECUTIVE SUMMARY:

Pandemics are foreseeable events. But COVID-19 was not a foreseen pandemic. And while presently the disease has neither a vaccine nor a cure, prophylactic treatment requires social distancing whose best practices⁶ have a blunt impact on the administration of justice. It is *not* an impact upon what the principle of Justice means. It is an impact to the *administration* of justice; that is, how Justice as an enduring principle is administered in everyday practice under these highly unusual circumstances. Prosecutors were at the forefront of leadership, identifying early the importance of remote deployment; the need for adaptive and innovative use of technology for administration of cases; the need to address the health of jail populations while maintaining public safety; and the new priority of taking what is learned about the application of technology to court administration, and then making permanent, institutional changes that improve the efficiency and the efficacy of the criminal justice system. The crisis will pass. What happens next will not look like it did before we knew what coronavirus was. The trajectory of the illness is still in front of us as are the best practices we can derive from our experiences.

STUDY DESIGN.

APAAC utilized SurveyMonkey to design a narrative-based investigation of four areas of need: remote deployment, administrative orders from courts, de-population of jails, and finding balance post-COVID-19. Other states have very effectively utilized binary (yes/no) or multiple-choice surveys to assess responses. The State of Tennessee is one example of a useful binary survey. While this is an effective survey method and it returns results quickly, APAAC utilized narrative prompts and

⁶ The now common six feet of individual separation and group assembly in very small numbers.

collected narrative answers to elicit two spheres of response: (a) common practices that emerge from each of the respondents' individual reactions under pressure; and (b) the unusual, innovative and breakthrough moments that a binary survey will not elicit. The purpose of the survey design is to assess prosecutorial best practices that emerge quickly in the midst of the fog of uncertainty, that are responsive to immediate needs in criminal justice administration, and that prosecutors would want to retain as the fruit of discovery that we call "innovation". To elicit the most candid responses, the survey assured confidentiality to the respondents. The respondent base is also representative of municipal, county and state prosecutorial leadership. While the survey response rate is limited,⁷ it is a sufficient representative sample from which to draw the information sought by the narrative format.

For these reasons, perhaps the most important aspect of the survey was the response deadline: April 15, 2020. At the time the survey was conducted, it was forecast that Arizona's pandemic experience would peak on April 23, 2020.⁸ The opportunity here is to assess our prosecutorial instincts in the fog of pandemic. How does prosecutorial leadership react under pressure? The presumption is that what prosecutors do under pressure - and equally, what they choose not to do – matters very much. There is no significant lead time to develop and test choices and approaches. There is only a limited amount of time to make decisions based upon the best available information. A second assumption is that prosecutorial responses will model prosecutorial values. And under pressured times, values are in evidence through the response to crisis. The survey assesses what prosecutors did and what they were unable to do, how they innovated, and what they seek to preserve.

The intent of this ongoing study is to revisit the respondents in the next 18 months once stability is restored and assess what insights and innovations constitute the new state of best practices in the field of prosecution.

⁷ The sample contains responses from 22 agencies, 17 of them from Arizona. This Report assesses responses from only the Arizona contingent. The survey was also propagated by the National District Attorneys Association of Arlington, Va., and five other agency leaders also replied. Those agencies appear to have instituted actions through state legislation on criminal justice reform that set their baseline preparedness at a higher level of functionality than Arizona. For example, reform measures included state funding to automate courtrooms and equip courtrooms with videoconferencing and teleconferencing which, coincidentally, gave their systems a preparedness advantage in an unforeseen situation such as a pandemic. A pandemic was not the impetus for the planning. But the planning made the pandemic easier to accommodate.

⁸ As reported by Institute for Health Metrics and Evaluation (IHME) on April 8, 2020; cited in the JLBC Staff Report, *Id.*, at p. 1.

I. The SARS-CoV-2 Virus.

Coronaviruses are a family of viruses that can cause illnesses ranging from common cold symptoms to severe, acute respiratory syndrome (SARS). The disease caused by the coronavirus in 2019 is called COVID-19. It was in March 2020 that the World Health Organization (WHO) declared the COVID-19 outbreak a pandemic.⁹ On April 17, 2020 the Centers for Disease Control published guidelines for Opening Up America Again. The key strategy for implementation is social distancing, small or no group assembly, stay-at-home orders, and sanitation practices;¹⁰ all strategies that have been widely disseminated since early March 2020.

It is in this period – March/April 2020 - that the disease impacts became foreseeable to political leadership and the general public. They were grim, unprecedented and unrelenting. What happened next in the realm of criminal justice services is the purpose for the survey. The survey questions and responses are attached.¹¹

I. Remote Deployment.

The United States Department of Homeland Security, Cybersecurity and Infrastructure Security Agency (CISA), identifies 16 sectors of “critical infrastructure”.¹² The Government Sector is one such critical infrastructure and the term is comprehensive of federal, state and local assets including courthouses.¹³ Critical infrastructure has a special responsibility to maintain functionality during crises. A functioning critical infrastructure is an imperative for the protection of public health and safety. The CISA provides guidance on identifying essential

⁹ Mayo Clinic, Coronavirus disease 2019 (COVID-19), COVID-19 Resources online. Copyright 1998-2020 Mayo Foundation for Medical Education and Research.

¹⁰ CDC Guidelines for Opening Up America Again, April 17, 2020.

¹¹ Appendix A.

¹² The Cybersecurity and Infrastructure Security Agency (CISA), is an agency of the Department of Homeland Security, and sets its mission as “The Nation’s risk advisor”. <https://www.cisa.gov/about-cisa>

¹³ “The Government Facilities Sector includes a wide variety of buildings, located in the United States and overseas, that are owned or leased by federal, state, local, and tribal governments. Many government facilities are open to the public for business activities, commercial transactions, or recreational activities while others that are not open to the public contain highly sensitive information, materials, processes, and equipment. These facilities include general-use office buildings and special-use military installations, embassies, courthouses, national laboratories, and structures that may house critical equipment, systems, networks, and functions. In addition to physical structures, the sector includes cyber elements that contribute to the protection of sector assets (e.g., access control systems and closed-circuit television systems) as well as individuals who perform essential functions or possess tactical, operational, or strategic knowledge.” <https://www.cisa.gov/government-facilities-sector>

workers who function within the critical infrastructure.¹⁴ The State of Arizona also adopted a means for identifying critical infrastructure,¹⁵ and relatedly, the minimum level of physical presence that is necessary for government to remain open for transaction of public business.¹⁶ The conclusion is that the criminal justice system, operating within local courthouses, is critical infrastructure and that its employees are an essential workforce.

While “essential” is inclusive of the role of prosecutor, and while the “courthouse” is most often associated with where prosecution is carried out, there is no specific requirement that all prosecutorial functions must be conducted within a courthouse or even a physical office. The designation of essential carries with it the responsibility to remain functional. And that responsibility incorporates consideration for the attributes of COVID-19 and the CDC (and other local) directives concerning public health and social distancing. Because remaining functional is not directly tied to a brick-and-mortar structure, the obvious solution to social distancing is to make separation happen by leaving the office and deploying remotely. However, survey results suggest that deploying remotely and doing it successfully are two different concerns. Success in alternative settings (the “remote” location) is highly contingent upon available technology and accessible internet with sufficient bandwidth.

a. The Brick-and-Mortar Office.

The survey asks several questions surrounding remote deployment. The fields surveyed include the office, the courtroom, contacts with law enforcement, and relationships with victims.¹⁷ Nearly all prosecution agencies deployed remotely.¹⁸

¹⁴ <https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19>

¹⁵ See: Ariz.Rev.Stat. §41-1801, et. seq. “Critical infrastructure” means systems and assets, whether physical or virtual, that are so vital to this state and the United States that the incapacity or destruction of those systems and assets would have a debilitating impact on security, economic security, public health or safety.” Consider whether courts and judicial administration fall within this category.

¹⁶ E.g., Ariz.Rev.Stat. §38-401: “State offices shall be kept open for transaction of business from eight o'clock a.m. until five o'clock p.m. each day from Monday through Friday except:

1. On holidays.
2. In implementing an agency furlough if the department of administration has authorized the state office to be closed in order to meet the furlough requirements. An agency that receives this authorization shall ensure that appropriate notice is given to notify the public of the office closure.
3. As otherwise provided by law.”

See as well Ariz.Rev.Stat. §11-413 relating to minimum hours for county offices; and Ariz.R.S.Ct., Rule 91, requiring hours for the superior court to convene and close each day.

¹⁷ Appendix A, Questions 5-8.

¹⁸ But at least one prosecutorial agency received no authorization to work remotely.

What varied most significantly is the amount of physical presence each agency maintained with the brick and mortar office and the quality of that presence, whether physically closed or accessible by appointment.

The most common shared practice was to close the structure, retain a skeletal crew, provide physical access to the public and law enforcement by appointment only, and rotate the onsite crew inclusive of both prosecutors and staff. One respondent compared their response to the situation commonly encountered during the Christmas to New Year's week.¹⁹ Rotation of both prosecutors, staff and victim advocates was a common practice.

Respondents presented a clear message to their employees for strict social distancing in the workplace. Several respondents noted that, in addition to rotations as described above, employees were working staggered shifts during the same workday, working fewer but extended workdays (the 4 x 10 workday), and working extended work weeks to include Saturdays. The combination of one or more of these practices allowed for depopulating the office setting which achieved better social distancing.

Although most every office instituted remote deployment, a few offices provided a split of telecommuting and physical office presence, one office providing a “2-3 split” (2 days in/3 days out; staggered across the workforce) or a 50/50 split with half at home and half in the office. One office deployed prosecutors remotely and then took the remaining staff and temporarily housed them in the vacant prosecutor office space, thus achieving a level of social separation for those that remained in the office.

Several respondents noted that the Facilities Departments of their greater organizations enhanced their cleaning services and included sanitizing dispensaries for frequent use. A few organizations had access to PPE (personal protective equipment).

b. Technology's Role In Remote Deployment.

Ninety percent (90%) of the offices responding to the survey also deployed remotely, at least in part. The remaining respondents did not have a remote footprint.²⁰ Every office that deployed remotely was dependent upon hardware, software, and

¹⁹ *Id.*, at p. 1.

²⁰ It is not obvious from the survey responses whether requests for remote deployment were made by prosecutorial leadership and rejected; and whether the decision to stay in the office was challenged by prosecutorial leadership. There is some distinction between elected and appointed leadership that may factor into the decision making. It is a matter for further investigation.

technology to do so. Although most offices were successful, some were not.²¹ Three critical items that made remote deployment more successful were: (1) the presence of a *pre-existing* VPN access capability; in combination with: (2) a software case management system such as Prosecutor by Karpel (PbK) or Justiceware; and finally: (3) a videoconferencing platform such as Microsoft M-Teams, Zoom, Skype or other equivalent communication software.

c. The Courtroom Setting.

The strongest response to successful application of social distancing came with the use of telephonic appearances in the courtroom. There was wide utilization of teleconferencing. This tool was accompanied in many jurisdictions with the use of videoconferencing. Tele- and videoconferencing co-existed in several jurisdictions and, when linked to the same equipment in detention facilities, most all criminal court functions were capable of being performed with a semblance of normality. This bundling of technological hardware provided the greatest opportunity for lasting innovation. There was no preference identified for the type of videoconferencing product. Some saw the court's use of Zoom and others saw use of Microsoft M-Teams. A preference may emerge as experience with the various products matures.

The second most prevalent contribution to successful deployment is prosecutorial case management software. Several vendors provide case management software, and no preference for a particular type of software is indicated. But the remote use of a management software contributed greatly to remote success because it significantly decreased the need for physical paper files and physical presence in the office.

A third contribution to success was acceptance of e-signatures and e-filing of criminal pleadings by the Clerk of Court offices. Respondents were most capable of completing the most frequent procedural functions when case management software is combined with e-filing and e-signatures, and there is conference capability in the courts and detention facilities. This recipe was the preferred combination for remote success. Not all respondents had access to this constellation of services.²²

²¹ Question 11: Self-reported 95% success rate.

²² At least one respondent from out-of-state explained that prior actions taken by their Legislature to bring about criminal justice reform resulted in teleconferencing infrastructure in the courtroom. This fully-equipped judicial infrastructure pre-existed COVID-19 and was not installed for the purpose of managing a pandemic. But because it was installed and active and stable, when the pandemic arrived the justice system was very capable of shifting to the technology platform to enhance its operations.

The success of telecommunications does not address two important procedural considerations: the jury trial, and criminal sentencing proceedings. By Administrative Order, the Arizona Supreme Court suspended all jury trials in Arizona through April 30.²³ No technology was indicated that would directly apply to the jury trial insomuch as none were being conducted. Prior to sentencing a fingerprint must be secured from the Defendant. This detail did not have a clear resolution one way or the other, and was a matter not overcome by technology prior to the survey deadline.

Other interim procedures that respondents implemented were continuing out-of-custody cases, addressing in-custody matters as a first priority, limiting the number of prosecutors in the courtroom, and utilizing videoconferencing with all law enforcement agencies. At least one jurisdiction allowed for videoconference appearance for witnesses at preliminary hearings. And at least one prosecutor established weekly meetings with judges on Fridays to manage administrative matters.

Some courts still required in person hearings, and at least one prosecutor had to “push” to have courts allow telephonic appearances from prosecutors.

d. Law Enforcement Partners.

There was a common approach with law enforcement agencies (LEA): no direct interaction unless necessary, with all business being conducted by telephone or email. Direct meetings with LEAs occurred by appointment only and with PPE present. LEAs would submit reports for charging review by email without exchanging physical paper. At least three jurisdictions utilized videoconferencing with LEAs and another sought to install “Polycom” in the prosecutor’s office through a memorandum of understanding with the LEA.

One office continued the practice of dispatching to the scene of serious felony offenses to be briefed by the LEA. For necessary meetings another office discontinued the practice of meeting in the prosecutor’s office and chose instead to utilize a conference room with limited attendance and PPE present. One jurisdiction indicated a preference to limit in-person contacts to a single standing meeting every Monday with LEAs.

²³ Arizona Supreme Court AO 2020-60. This Administrative Order was later extended through the end of May, 2020. AO 2020-70.

e. Victim Services.

A similar common approach emerged for delivery of victim services. There was a strong preference for the use of email, texts, and phone calls, with in-person meetings only when necessary and with PPE present. Offices were closed to walk-ins. Offices also did more advanced planning with victims, discouraging victims from making personal appearances in court and coordinating with victims to appear telephonically. Most offices had no physical contact with victims except for assistance with orders of protections which can now be secured in Arizona electronically.

II. The Role of Information Technology Services.

Most every respondent commented positively on the role of their agency's Information Technology (IT) Department, calling the partnership "instrumental" and "critical".²⁴ For example: "Less than three weeks ago we had no telecommute ability. IT stood us up in three weeks". And: "Great role. IT brought M-Teams forward and hooked up all administrative teams and enabled remote access to all departments." IT had a vital role in ensuring that employees could continue to work remotely, and assuring that prosecutors had access to case management software and shared network files through VPN (protected access). IT set up laptops and computers for remote work and continued to be available for troubleshooting issues. IT also set up videoconference capabilities.

While there was general praise for IT's response internally, the technology must interact with other outside users in order to make judicial administration complete. And success, therefore, depends upon the degree to which the technology is available to, and then compatible with, other justice stakeholders. Some differences appeared.

Standard pre-COVID 19 techniques still prevailed: email, texting, and phone calls. One respondent noted that criminal justice partners' accessibility has been an issue, particularly with the courts and the defense bar, who operate on a different platform and system. The systems are not integrated. Several noted the struggle it has been to have the courts accept the introduction of technology for items such as telephonic appearances.

²⁴ More than one respondent used the same adjectives to describe the relationship. Not all respondents were positive. One respondent mentioned that their IT was largely non-existent. Another advised that their Administration did not authorize remote deployment so IT services were not involved in COVID response.

Prosecutors generally led conversations with the courts to introduce helpful technologies such as videoconferencing and e-filing. Videoconferencing was most useful for Defendant initial appearances, and in one instance a private phone line was installed in parallel fashion to allow Defendants to have private confidential conversations with their appointed counsel. IT was instrumental in working to equip the courtroom with technologies that the parties could use to make the administration of justice successful, working for all agencies and not for any particular agency.

Several prosecutors noted a general sense of reticence among judges to accommodate the administration of justice with technology, noting either the struggle that occurred, or that the clerk's office does not allow electronic filing, or simply that the Justice Court (as opposed to the superior court) does not allow telephonic appearances. The general observation from respondents is that technology exists, but its adaptation is spotty and occurs in inconsistent patterns. It can be incompatible with other similar platforms existing in the same place at the same time. Some systems lacked integration. But where they did exist and were compatible and complete, technology was a significant aid to the administration of justice.

III. Adaptation By Administrative Order.

The nation's courts have never been noted for their widespread use of technology to process criminal cases.²⁵ Instead, even in the digital age litigants still are accustomed to observing what appears to be an analog process, followed by waiting periods. Waiting to address the court in turn, waiting for decisions, and waiting for dispositions. The onset of coronavirus and social distancing has challenged the administrators of this stable but manual process to modify their practices. Modifications to practices and procedures most frequently appear through adoption of Administrative Orders. The adoption of orders can appear to be less nimble than the alterations prosecutors can make simply by changing policies. But survey responses indicate that, by April 15, 2020, ninety percent (90%) of court jurisdictions modified practices by Administrative Order [AO]. And in those ninety percent of instances where AO modifications were issued, the prosecutor participated in, or advocated for, those modifications.

In summary fashion the types of innovations sought and adopted include the following: telephonic appearance for routine matters; permission for e-filing;

²⁵ E.g., *The Crime Report*, The Wired Courtroom: Online Justice During The Pandemic, April 17, 2020. <https://thecrimereport.org/2020/04/17/pandemic-spurs-courts-to-make-better-use-of-technology/>

permission for e-signatures; video and telephonic hearings for attorneys; permission for witnesses to testify at preliminary hearings by video and audio; extending empaneled Grand Juries from four to six months; agreements on master calendaring of hearings; limiting the number of persons in the courtroom; and retaining certain in-person hearings while minimizing defendant transportation to and from the jail.

One jurisdiction saw the cooperative and joint use of IT equipment and shared problem-solving by IT without regard for the source of the IT personnel. At least two prosecutorial offices sought prior agreements with public defender groups before approaching the courts, and then secured agreements to continue all matters on upcoming calendars including all trials, pretrial conferences and even arraignments. And then they sought the use of e-filing of all pretrial motions without the necessity of producing or exchanging hard copies of the same.

Frequent communication, at least weekly and sometimes daily, with court management and other criminal justice partners was a common denominator for addressing modifications to administrative procedures. The modifications were directed at making remote practices successful while comporting with the constitutional rights of both defendants and victims.

Interestingly, when asked which of the modifications that prosecutors advocated for were actually adopted by AO, there was a range of responses from “All of them” to “None of them”. A respondent noted that while courts were receptive to their concerns and prosecutors had an impact with some of the judges, they were not effective with the presiding judge.²⁶ The modifications that were considered were unevenly adopted within a single jurisdiction and across the jurisdictions.

As for innovations that were proposed and rejected the responses were also uneven and parochial. The proposals there were cast away include allowing prosecutors and police officers to appear telephonically at preliminary hearings and doing change of pleas and sentencings remotely. Identification issues and the inability to speak in person to witnesses were noted as the cause for rejection.

²⁶ The range of responses and experiences seem to indicate that superior courts operate locally as a vestige of feudalism, with a level of local control over their county jurisdictions that is exercised sparingly, and inconsistently from jurisdiction to jurisdiction. Litigants can unify and advocate for innovation which comes only upon concurrence of the presiding judge who also is beholden to a supreme leadership. The responses indicate how cumbersome and uneven the process becomes under pressure and can explain why the uploading of technology tends to lag amongst the courts as a whole.

IV. Taking steps to depopulate detention facilities.

It is a true statement that detention time spent in a local jail is a period of compulsory cohabitation. Jail time is not spent alone or in isolation. So strict social distancing is not a matter that a detainee can achieve voluntarily without cooperation of superiors. Nonetheless, social separation and avoidance of congregations remains a COVID-19 best practice. The survey indicates that prosecutors inherently understood the risk posed to public health by time spent in detention and sought to take reasonable steps to responsibly depopulate local detention facilities. Eighty percent (80%) of respondents took affirmative steps to depopulate facilities in their jurisdiction.

There were many different described practices directed at both the front-end of entry into a facility and at the back end of completion of detention. On the whole the respondents noted the use of cite-and-release practices by law enforcement in situations that would more frequently be handled by arrest and booking. Of those arrested, respondents noted the use of “long-forming” the majority of complaints to be filed against suspects unless the matter involved a serious victim crime. The charges that were filed between the initial arrest and the 48-hour in-custody period were those that implicate public safety. As stated in the survey, “The concept of OR release has taken on a whole new meaning”.²⁷ The attention then was drawn to in-custody cases.

Of those in-custody, prosecutors worked with jail personnel to identify who could be released. Criteria included the inmates in the population that are most vulnerable to the disease, and these vulnerable inmates with low danger assessments were released into community release programs. Other prosecutor practices include: releasing offenders who will finish their sentences within 30 days or less and are at a low risk for re-offending; releasing persons pending probation revocation if the likely result of the revocation hearing is reinstatement to probation; dismissing probation revocation cases if the likely result is reinstatement on probation; eliminating jail terms on plea agreements for less serious offenses; dismissing a low level municipal misdemeanor case if a defendant was recently sentenced in superior court for a higher order offense of the same nature (ex. dismissing paraphernalia charge if convicted of narcotics possession); considering all legitimate defense motions for changing the terms of pretrial detention; reviewing files of in-custody defendants and filing motions with the courts to issue release orders; reviewing every single transport request from jail to municipal court to reduce the number of

²⁷ Appendix A, at p. 16.

transports; reducing the number of active warrants for less serious crimes; postponing jail sentences for misdemeanor crimes; and working to release defendants from jail with the understanding that they will return to complete their jail time at a later date.

At least one jurisdiction pointed out that previous work done to keep jail populations low by using mobile crisis teams and crisis stabilization units, and training officers on de-escalation skills, resulted in less pressure at the front-door of the booking facility during the declaration of COVID-19 emergency.

Cite-and-release, active measures to depopulate the detention facility, and natural attrition of persons completing the service of their sentences reduced jail populations and then sustained the populations at lower levels.

When asked what criteria prosecutors considered in making release recommendations, the respondents consistently pointed to detention for dangerous, violent, and victim injury crimes by perpetrators with criminal histories that had components of public safety risk if not detained. A respondent poignantly identified the dilemma of a person who poses a danger to the community if released and a danger to the jail population if detained. A history of prior criminal conduct and the risk of re-offending while on release weighed in favor of continued detention despite the risk of danger to the detainee population.

Dangerousness and risk to the community were the lead indicators of continued detention, as was a level of supervision (if any) while released. The strength of the responses indicate that prosecutors did not demonstrate a struggle with deciding who should remain in custody. And all prosecutors implemented their decision-making on a case-by-case basis. There was no response indicating anything other than an individual release determination in each case.

Ninety percent (90%) of prosecutors saw a reduction in jail populations and ninety-five percent (95%) of prosecutors were comfortable that the competitive goals of public health and public safety had been adequately met in their communities.

V. Finding Balance Under Challenging Times.

The responding prosecuting agencies all candidly expressed both positive and negative consequences of the early stages of pandemic response. Many found balance under the temporary challenge, though some expressed concern for an uncertain future.

Among the persistent challenges is the difficulty in deciding who is, and who should be, in the office or at home. It appeared easier for attorneys to work from home than it did for staff, and a respondent's concern with this imbalance is for the inequity of it all. Some offices were not prepared to work remotely, and it took a lot of quick action to "ramp up". VPN networks should have been established sooner in some jurisdictions, and IT departments worked hard to add capacity and numbers of users where capacity was non-existent. Legal research is difficult to conduct remotely. Respondents scrambled to find and stock PPE.

The courts experienced a serious slowdown of activity. "The backlog is going to be impossible to deal with if this continues much longer. There will be more intense pressure on prosecutors once jury trials return."²⁸ Prosecutors foresaw the need to work closely with defense attorneys to reach resolution on cases. One jurisdiction could not use their grand jury which is a common mechanism for charging cases statewide. And another did not find a balance but was just trying to cope with the situation.

On the positive side, respondents indicated that they are still able to address most of their core responsibilities and successfully communicated with staff using technology "to a degree that I never imagined".²⁹ On the staffing side offices took to shift work and rotating schedules, and different splits of percentages for those who would work in the office and then remotely. Respondents noted that the workforce 'stepped up' to help each other and that the workforce appreciates new ways of doing things and sought permission for more remote work from home.

An aggressive work-from-home strategy was made possible by migration to electronic case file management systems particularly for those offices that migrated to systems before the pandemic ensued. The various methods for teleconferencing, videoconferencing, electronic case file management, and secure communications through VPN portals left offices who invested in the infrastructure prior to onset in a more nimble position than those offices who had only parts of the infrastructure in place. There remains interconnectivity issues with justice partners. And the lagging indicator for overall success was the nimbleness (or stiffness) of the courts, and their willingness to accept and implement change as necessity demanded.

²⁸ Appendix A, p. 20.

²⁹ Appendix A, *Id.*

VI. New Ways Of Doing Business With The Courts, Defense Bar, Victims and Law Enforcement That Are Identified As Best Practices.

This question was explored at various times in the survey. The answers were consistently the same:

There is a strong preference for teleconferencing, videoconferencing, and Clerk of Court acceptance of e-filing of pleadings and e-signatures on pleadings. To be useful, the technological advances require a greater degree of common technology across the criminal justice platform, integrating stakeholders including the prosecutors and defense bar, the courts and the jails. Those offices that installed case file management systems and moved toward the paperless office prior to the pandemic had less barrier to remote deployment than those that had not done so. Having a secured access channel to office files through a VPN connection was necessary, and there were offices that deployed remotely but required time to scale up with hardware and software. The transition to remote deployment was more easily a success for those who had the infrastructure in place beforehand, but was not impossible for those that did not *if* they had the added quality of a dedicated IT staff with capacity to make it happen quickly.

Many offices foresee a future where they remain permanently, remotely deployed to some degree. “Many of the things we have been doing face-to-face can be done remotely”.³⁰ A respondent saw more efficiency with some tasks performed remotely while another prudently advised that it is too soon to know if the pandemic response has shown us better ways to work with the courts and others.

Specific recommendations include further utilization of videoconferencing for certain hearings such as initial appearances, and expansion of videoconferencing to include remote changes of plea. A second recommendation surrounds the many instances when teleconferences would suffice for attorney personal appearances. As pointed out, many of the ministerial court proceedings can be accomplished virtually.³¹

An enduring best practice mentioned by many respondents is improved communications with staff, and with defense bar, courts, victims, witnesses, and law enforcement. It takes work to sustain communications, but respondents saw the

³⁰ Appendix Id.,

³¹ Appendix A, p. 23.

value of maintaining greater communications for long term improvement of the criminal justice system.

Employees responded well to alternatives to the office setting and were adaptive to various work-week configurations, whether in flexible office hours or flexible work weeks.

VII. Some Final Observations.

The SARS CoV-2 virus and prosecutorial responses to this existential threat allow for some general remarks about the criminal justice system and the prosecutorial role in responding to sudden emergencies. First, in the fog of the pandemic Arizona prosecutors concluded that their leadership required preservation of their workforce by instituting social separation. Prosecutors deployed their workforce remotely to different degrees, and with creative use of hours, shifts, and rotations. The success of the operation was contingent in large part upon existing infrastructure from which to work remotely; and relatedly, the ability of the greater organization to scale-up quickly and sustain the effort over time. IT experts and support personnel were critical to success. Various platforms exist to support tele- and videoconferencing, electronic pleadings, software for case management, and an ability to do functions securely. But a critical aspect of success is the wide dispersion of a single, integrated platform across the same criminal justice stakeholders who operate in the courthouse ecosystem. Lack of integration is an obstacle. And even if integration of a wholesome platform is possible, the lack of adoption by court administration itself can frustrate the purpose.

Much experimentation ensued during the pandemic and various agencies enjoyed limited success with a variety of products and vendors. But for the sake of ensuring the functionality of an Arizona and United States Department of Homeland Security CISA-designated ‘critical infrastructure’, operated by an ‘essential workforce’, it would be wise to have the Arizona courts lead in such a way as to select and then harden the tele-infrastructure of its choice and allow it to function as the critical infrastructure of the courthouse. The courts, it turns out, are among the least prepared and most uneven first responders to this pandemic crisis. Their lag in terms of technological advances is a strong indicator of weakness in the state and national public safety infrastructure. The feudal nature of jurisdictional administration is a negative attribute when facing a national crisis. It is a barrier to innovation in ordinary times and a liability to the administration of justice in an emergency. There should be resolve to remedy this shortfall. Prosecuting agencies can further lead by

demonstrating the many ways in which prosecutors quickly responded to the crisis with leadership and just decision making.

To this end, prosecutors timely identified the conditions of detention that put citizens at risk. Acting independently within their jurisdictions, prosecutors moved to reduce detention populations for those individuals of high risk for infection but low risk to community safety. As to these, prosecutors worked upon individual review of release conditions that address the public health concern and balanced it against the need for public safety. No mass release strategy was considered. But populations were deliberately reduced through a variety of considerate strategies. Cooperation and communication with stakeholders is an attribute of success that prosecutors utilized to act responsibly. And it is an attribute identified as a continuing best practice.

This study reviews Arizona's first few weeks of deliberate but often incomplete response to a national tragedy. The objective is to collect reflections and actions by prosecutors upon their respective criminal justice systems and during the early fog of the COVID-19 crisis. The hypothesis is that agencies will learn, adapt and reset to a new standard of best practices. So the product of this exercise is the identification of noteworthy practices that advance the work of criminal justice in Arizona.

Approximately eighteen months from now APAAC will send a second survey to name and identify which of the many best practices that were incubated in the crisis have taken hold or should take hold as a result of what prosecutors learn from the unorthodox opportunity that a black swan event created within in Arizona's criminal justice ecosystem.

QUICK REFERENCE GUIDE

PROSECUTOR RESPONSES TO CRIMINAL JUSTICE

ADMINISTRATION DURING COVID-19

1. Technology.

- e-signatures on criminal pleadings.
- e-filing with Court Clerks for criminal pleadings.
- Full teleconference capability.
- Full videoconference capability.
- Separate, secure teleconference line for defense attorney-client communications.
- Paperless case file management systems.
- VPN secure access to Office infrastructure.
- Single, integrated technology platform for all video-teleconferencing.
- Wide dispersion of single, standard technology platform among prosecutors, defense bar, courts, jail and adult probation.
- Continued wide use of text, telephone and email.
- PPE.

2. Deployment.

- Remote work authority.
- Minimum on-site Office crew.
- Rotation of crews on-site.
- Split shifts on-site, daily or weekly.
- Alternative daily work hours (ex. 4x10; 8 a.m. to 12 p.m.).
- Extended work week inclusive of Saturdays.

3. Administrative Orders.

- Frequent, standing dates for communication with justice partners.
- Frequent, standing dates for communication with Courts and court administration.
- Presentation to Courts of agreed-to terms by justice partners.

4. Depopulation of Detention Facility.

- Expanded use of cite-and-release.
- Use of long-form complaints in less serious offenses.
- Early release of prisoners set to complete their sentences within 30 days.
- Generous consideration of legitimate Defense motions to amend the terms of detention, making release available.
- Agreements to release probation revocation detainees whose likely result is reinstatement to probation.
- Agreements to dismiss probation revocation detainees whose likely result is reinstatement to probation.
- Individualized case review of each defendant scheduled for a jail transport to and from court.
- Coordination with jail command staff as to detainees who are higher risk for infection and low risk to public safety if released to community release programs.
- Reducing active warrants for less serious offenses.
- Postponing jail sentences for misdemeanor crimes.
- Previous establishment of crisis response teams and de-escalation training for LEA's in order to divert individuals from booking.